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EVERISE SPRINT (M) SDN BHD

v.

MENTERI KEWANGAN MALAYSIA & ANOR

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HIGH COURT MALAYA, SHAH ALAM
VERNON ONG J
[JUDICIAL REVIEW NO: 25-119-07-2012]
27 FEBRUARY 2014

C ***ADMINISTRATIVE LAW:*** *Judicial review - Certiorari - Minister's refusal to remit duties and taxes under s. 14A of Customs Act 1967 and s. 33 of Sales Tax Act 1972 - Whether Minister considered all evidence and materials - Whether improper motive shown - Whether just and equitable exercise of discretionary power*

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The applicant, who was in the business of buying and selling used prime movers, imported 59 units of used prime movers into Malaysia from Great Britain. The prime movers were imported using the approved permits ('AP') belonging to Red Synergy Corporation Sdn Bhd ('Red Synergy'). The customs declaration form which was submitted for the importation of the prime movers stated Red Synergy as the consignee/importer of the goods. The consignor was Scania (GB) Ltd of United Kingdom ('Scania UK'). The customs duties on the prime movers were assessed under s. 13(1) of the Customs Act 1967 ('the Act'). However, a subsequent audit conducted on the importation of the prime movers revealed that the declared value and the assessed value were not based on the actual value and amount paid to the exporter. As such, there had been shortfall in the import duties and sales taxes payable to the customs. Pursuant thereto, the customs issued notices of demands to the applicant to recover the shortfall. The applicant, however, denied liability on the ground that they were not the importer of the prime movers. Subsequently, the applicant applied to the Minister of Finance ('the first respondent') for a remission of the duties and taxes under s. 14A of the Act and s. 33 of the Sales Tax Act 1972 ('STA') which was refused by the first respondent. Hence, the application for judicial review for an order of *certiorari* to quash the first respondent's decision. The applicant's principal argument was premised on the ground that they were not the importer of the prime movers and contended it was the duty of the first respondent as the decision maker to make a full enquiry on the

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claims and apply his mind on the evidence on record and not act mechanically in accepting the views of the State Director of Customs Selangor (the second respondent). A

Held (dismissing application):

(1) Pursuant to s. 14A of the Act and s. 33 of the STA, the Minister is vested with a discretionary power whether to remit any duties or taxes, provided that he thinks it just and equitable to do so. Although the discretionary power of the Minister was very wide, it is not unlimited. As long as the exercise of the discretion was without improper motive, the exercise of discretion must not be interfered with by the court. The court will interfere if it can be shown that the Minister had misdirected himself in law or had taken into consideration irrelevant matters or had failed to take into account relevant matters, or if his decision militates against the object of the statute. (paras 35, 36 & 41) B C D

(2) The first respondent had considered all the evidence and materials submitted by the second respondent. There was no evidence to show that the first respondent had taken into account any irrelevant evidence or material or that he had failed to consider any relevant evidence or material. The first respondent had considered all the relevant evidence and materials before arriving at his decision. (paras 42 & 48) E F

(3) It could not be denied that the applicant played a key role in the importation of the prime movers into Malaysia. Red Synergy was the conduit as it was the holder of the APs without which the prime movers could not be imported into Malaysia. The invoices for the services charges and customs duties were issued by the forwarders to the applicant and the applicant paid both the service charges and duties in full. The applicant had also accepted the fact that they were liable for all duties and taxes when they signified their acceptance on a copy of Scania Malaysia's letter. The e-mails between Scania UK and the applicant evidenced direct dealing between the parties for the importation of the prime movers. There was also assertion by the applicant that it purchased the prime movers from Scania Malaysia. (paras 52 & 53) G H

(4) Based on the facts, it was reasonable to infer that it was just and equitable to refuse to grant a remission on the ground that the applicant was an importer and was therefore beneficially interested in the prime movers at and from the I

time of importation until their removal from customs control pursuant to s. 2 of the Act. The applicant had failed to make out a case to show that the first respondent had failed to exercise his discretion improperly or for an improper motive. (paras 53 & 55)

Case(s) referred to:

Anisminic Limited v. The Foreign Compensation Commission & Anor [1969] 1 All ER 208 ***(refd)***

Associated Provincial Picture Houses Limited v. Wednesbury Corp [1948] 1 KB 223 ***(refd)***

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 1 LNS 14 ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***

Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***

Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227 CA ***(refd)***

Minister Of Labour & The Government of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors [2011] 1 CLJ 50 CA ***(refd)***

Penang Development Corporation v. Teoh Eng Huat & Anor [1992] 1 CLJ 476; [1992] 3 CLJ (Rep) 204 HC ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***

Quah Swee Khoon v. Sime Darby [2001] 1 CLJ 9 CA ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 CA ***(refd)***

Rohana Ariffin v. Universiti Sains Malaysia [1998] 1 CLJ 559; [1988] 2 CLJ Rep 390 HC ***(refd)***

Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal [1998] 3 CLJ 85 CA ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2), schedule
Customs Act 1967, ss. 2, 13(1), (2), 14A, 79, 100, 100A
Customs (Rules of Valuation Regulations) 1999, reg. 4
Industrial Relations Act 1967, s. 20(3)

Rules of Court 2012, O. 53 r. 2(2)
Sales Tax Act, s. 33
Specific Relief Act 1950, s. 44

Other source(s) referred to:
Anandan Krishnan, *Words, Phrases & Maxims, Legally & Judicially Defined*, vol 10 Lexis Nexis, p 272; vol 11, p 128
Stroud's Judicial Dictionary of Words and Phrases Seventh Edition, p 1644

For the appellant - JR Ravendren; M/s JR Ravendren & Assocs
For the respondents - Natra Idris; AG's Chambers

Reported by S Barathi

JUDGMENT

Vernon Ong J:

[1] The application for judicial review herein is for an order of *certiorari* to quash the decision of the Minister of Finance (first respondent) dated 25 May 2012 which refused to grant to the applicant a remission of import duties and sales tax under the Customs Act 1967 and Sales Tax Act 1972 and other ancillary relief. On 30 October 2013, the court heard submission of counsel of the parties; and on 29 November 2013 the court dismissed the application with costs. The grounds of the decision are as follows.

Brief Account Of The Salient Facts

[2] The applicant is in the business of buying and selling used prime movers.

[3] In the months of March to June 2008, 59 units of used prime movers were imported into Malaysia from Great Britain. The importation of the prime movers into Malaysia requires approved permit ('AP') issued by the Ministry of International Trade and Industry (MITI).

[4] The prime movers were imported using the APs which belonged to Red Synergy Corporation Sdn Bhd ('Red Synergy').

[5] According to the customs declaration form (borang K1) which was submitted for the importation of the prime movers, Red Synergy was stated to be the consignee/importer of the goods. The consignor was Scania (GB) Ltd of United Kingdom ('Scania

A UK'). The two authorised agents which were nominated to handle the importation was IMF Supplies & Services Sdn Bhd and Yumaco Freight Sdn Bhd ('the forwarders').

[6] The customs duties on the prime movers were assessed
B based on the value of RM33,000 per unit of prime mover under s. 13(1) of the Customs Act.

[7] The prime movers were released after the forwarders settled the duties and taxes assessed.

C **[8]** Subsequently, an audit was conducted on the importation of the prime movers for the purposes of verifying the declared value by the importer and the assessed value by the customs officer.

[9] The audit revealed that the declared value and the assessed
D value were not based on the actual value and amount paid to the exporter. As such, there had been insufficiencies in the import duties and sales taxes which were payable to the customs.

[10] As the shortfall were treated as a debt, the customs issued
E a notice of demand dated 25 March 2011 to the applicant to recover the short payments from the applicant in respect of 23 units of prime movers in the total sum of RM782,087.19. Another notice of demand dated 1 April 2011 was issued for RM1,467,340.29 in respect of the remaining 45 units of prime
F movers. On 28 March 2012, the customs issued an amended notice of demand for the shortfall of import duties and sales taxes of 36 units of prime movers (originally 45 units) for RM1,165,034.95.

[11] The applicant denied liability on the ground that they were
G not the importer of the prime movers.

[12] On 20 April 2012, the applicant applied to the first respondent for a remission of the duties and taxes under s. 14A of the Customs Act and s. 33 of the Sales Tax Act.

H **[13]** On 25 May 2012 the first respondent wrote to the applicant informing that the applicant's request was refused.

Applicant's Case

I **[14]** The applicant's case is premised on four main grounds:

(a) That the first respondent failed to consider the fact that the State Director of Customs Selangor (the second respondent) had misdirected itself in law in asserting the claim because the

importation of the 59 units of prime movers and the customs declarations were made by Red Synergy and not the applicant under s. 79 of the Customs Act;

(b) The first respondent failed to consider the fact that the second respondent misdirected itself in law in making the claim when in actual fact the payment to the consignor/exporter in respect of the purchase of the 59 prime movers was made by Scania (Malaysia) Sdn Bhd ('Scania Malaysia') and not the applicant pursuant to Regulation 4 of the Customs (Rules of Valuation) Regulations 1999;

(c) The first respondent failed to consider the fact that the applicant had only purchased the 59 units of prime movers from Scania Malaysia based on the invoices issued by Scania Malaysia at the local market price after the prime movers were released from customs control; and

(d) The first respondent failed to consider the fact that the second respondent had compounded Red Synergy in relation to the importation of the 59 units of used prime movers but failed and/or refused to make the claim for the shortfall against Red Synergy as the importer of the 59 units of prime movers.

Judicial Review In Malaysia

[15] Judicial review is a branch of law dealing with administrative law. In its traditional sense, it refers to the exercise of the court's supervisory powers over the decisions of inferior tribunals and statutory bodies. The decisions are tested against established principles developed over time by the common law (see recent decision of the Court of Appeal in *Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors* [2011] 1 CLJ 50; [2011] 6 MLJ 507).

[16] The powers of the High Court of judicial review is enshrined under the Specific Relief Act 1950 and the Courts of Judicature Act 1964 ('CJA 1964'); in particular the additional powers which are set out in para. 1 of the Schedule to s. 25(2) CJA 1964. It empowers the High Court to issue to any person of authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution. In fact, an application for judicial review may include a prayer for a declaration (O. 53 r. 2(2) ROC 2012). In

A the context of an application for judicial review of a decision of an inferior tribunal or statutory body, the court is usually called upon to make an order for *mandamus*, prohibition or *certiorari*. An order of *certiorari* has the effect of quashing a decision of a judicial or quasi-judicial authority with the intention of restraining any *ultra*
B *vires* exercise of powers. An order of *mandamus* is directed to private or municipal corporations, or to any of its officers, commanding the performance of a particular act or duty mandated by law (see s. 44 of the Specific Relief Act 1950). An order of prohibition is directed only against a judicial or quasi-judicial
C authority in respect of proceedings before them.

Distinction Between Public Law Proceedings And Private Law Proceedings

D **[17]** Underlying the distinct nature of an application for judicial review is the requirement in Malaysian common law to have regard to the interest of good administration. In order to appreciate this concept, it is essential to draw a distinction between public law proceedings and private law proceedings.

E **[18]** In private law proceedings, it is the parties alone who are directly concerned with the outcome of the litigation. The public at large are not usually interested in the outcome. Be that as it may, the public as a whole are concerned only that private law proceedings should provide a fair and efficient manner of resolving
F disputes between individuals and of enforcing the rights of one individual over another.

[19] In contrast, public law proceedings usually affect many members of the public or even the public at large as well as the
G parties to the proceedings (eg, decisions of public bodies concerning Orang Asli native land rights, environment issues, planning permission, public nuisance, etc). Other members of the public will be interested to a lesser extent, whether financial or otherwise. However, there are also public law proceedings which
H do not usually affect the members of the public. A common example of this involves a person's application to quash the decision of the Industrial Court dismissing his claim for reinstatement on the ground of unlawful dismissal. In these cases, the court will be largely, if not exclusively, concerned with the
I merits of the application alone. Both sets of proceedings are treated as public law proceedings because the decision is taken by a public body performing a public duty. Typically, the public

bodies qua respondents in an application for JR would be the Ministry of Human Resource, Minister of Home Affairs, Registrar of Societies, State Executive Council, Registrar of Land and Mines, BURSA Malaysia, Securities Commission, Government departments (such as Immigration, Royal Customs, Royal Malaysian Police), tribunals (such as Housing Tribunal, Consumer Claims Tribunal), statutory bodies (Malaysian Medical Council, Lembaga Akitek Malaysia), Service Commissions, Director General of Inland Revenue, Majlis Agama Islam and the Appeal Board constituted under the Town and Country Planning Act 1976, to name a few.

[20] As a general rule, the court has to take into account not only the interests of the applicant and the respondent but also the interests of the public as a whole in good administration.

[21] Judicial review is therefore primarily concerned with enforcing public duties on behalf of the public as a whole. In this sense, the court's concern with vindicating the interests of the individual is part of the process of ensuring that public bodies do not act unlawfully and that they do perform their public duties.

Principles Of Judicial Review

[22] At the outset it should also be noted that the remedy of judicial review is not concerned with reviewing the merits of the decision in which the application for judicial review is made. Instead, the remedy of judicial review is primarily a review of the decision making process. In performing this role the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction. (*Michael Lee Fook Wah v. Menteri Sumber Manusia, Malaysia & Anor* [1998] 1 CLJ 227; [1988] 1 MLJ 305). The court will not interfere with the exercise of any power or discretion which has been conferred on an inferior court, administrative tribunal or other public authority. However, the decision of the body may be quashed by an order of *certiorari* where (i) that body has acted without jurisdiction; or (ii) that body has exceeded its jurisdiction; or (iii) body has failed to comply with the rules of natural justice in a case where the rules are applicable; or (iv) there is an error of law on the face of the record or the decision is unreasonable in the *Wednesbury* sense. In short, whether *certiorari* will lie to quash the decision which has already been made by that body depends not on the decision itself but on whether the decision was made *ultra vires*, unfairly or unjustly in the exercise of the discretion.

[23] In dealing with this application for judicial review the fundamental principles to be applied as enunciated by the Court of Appeal in a case involving a judicial review of an award of the Industrial Court are instructive. In *Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501; [2006] 3 MLJ 493 CA at pp. 526-527 (CLJ); p. 511 (MLJ) Mohd Ghazali JCA (later FCJ) said:

> From the authorities discussed above, I would think that *in dealing with judicial review a judge should have the following principles, inter alia, in the forefront of his mind:*
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> (i) *judicial review is not an appeal from a decision but a review of the matter in which the decision was made;*
>
> (ii) *the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;*
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> (iii) *the High Court through judicial review, should not introduce technicalities of the court of law* to the Industrial Court; this would certainly be so as s. 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of the case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;
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> (iv) the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal.
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> (v) *the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law;*
>
> (vi) *the High Court will not interfere with findings of fact by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.* (emphasis added)

[24] Against the backdrop of the Court of Appeal's decision in *Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam*, *supra*, in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1 (FC) the Federal Court held that the distinction between review and appeal no longer holds. The principles to which a reviewing court should scrutinise included the following matters:

(i) the decision making process where the impugned decision is flawed on the ground of procedural impropriety;

(ii) the merits where the decision is grounded on illegality or plain irrationality;

(iii) the findings where the facts do not support the conclusion arrived at by a tribunal; or

(iv) the findings where the findings of the tribunal had been arrived at by taking into consideration irrelevant matters, and had failed to take relevant matters into consideration.

[25] Be that as it may, the power to review a decision on its merits is not absolute. In cases involving public policy, national interest, public safety or national security, it may be inappropriate to go into the merits or otherwise of a decision during a judicial review application (*Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11 (FC); [1997] 1 MLJ 789 (FC); *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625 (FC); [2004] 2 MLJ 288 (FC).

[26] In the light of the above cited authorities, it is settled law that there are three principal grounds upon which a court may review a decision of an inferior tribunal or statutory body. They are:

(a) Procedural Impropriety;

(b) Illegality; and

(c) Irrationality.

Procedural Impropriety

[27] This is a classic case of review of the decision-making process. It addresses the decision-making process to test for procedural fairness with reference to the context and applicable statutory provisions. It includes the right to be heard, the rule

against bias and the requirement of prior notice of the decision so that the person affected by the decision will be in a position to make representations and to adequately prepare and answer the case against him. There is also a duty of adequate disclosure. Whilst there must be a fair hearing, there is no general right of oral hearing. There is no general right to call witnesses or to cross-examine witnesses. There is also no general right to legal representation. Whilst there is also no general duty to give reasons, such failure to give reasons may give rise to the inference that there are no valid reasons for the decision. Further, there must be a real hearing. The decision maker cannot fetter its discretion by self-created rules of policy. The decision maker must be impartial and free from bias; the test for bias being absence of direct pecuniary interest (*B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 LNS 14; [1962] MLJ 69; *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal* [1998] 3 CLJ 85 CA; *Rohana Ariffin v. Universiti Sains Malaysia* [1988] 1 CLJ 559; [1988] 2 CLJ Rep 390).

Illegality

[28] This involves a review of the decision-making process, not the merits. This is a typical ground for the control of discretionary power. Classic examples of illegality include 'error of law' and 'excess of jurisdiction', abuse of power and *Anisminic* error. Under this head, the court will consider whether the public body in question had acted within the terms of power granted to it and within the bounds of the statutory purpose (*R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; *Ranjit Kaur Gopal Singh v. Hotel Excelsior* [2010] 8 CLJ 1). Decisions tainted with illegality may arise if a decision maker makes a decision for an extraneous purpose or improper motive or takes into consideration irrelevant factors and or fails to take into consideration relevant factors. The court must also be satisfied that the decision is not actuated by *mala fide*. The decision-making process must also not violate the rule against delegation of discretionary power or the rule against deciding on no evidence or making findings of fact with no rational evidential basis; though as a rule there is non-interference with the assessment of evidence, particularly testimonial evidence (*Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9; *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 1 MLJ 481; *Quah Swee Khoon v. Sime Darby* [2001] 1 CLJ 9; [2000] 2 AMR 2265).

[29] Lack of jurisdiction may arise in circumstances where a tribunal ask itself the wrong question; or take into account matters which it was not directed or required to take into account; or may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. (*Anisminic Limited v. The Foreign Compensation Commission & Anor* [1969] 1 All ER 208, 213-214).

Irrationality

[30] Under this ground, the issue is not whether the decision-maker strayed outside the purposes defined by the governing statute (the 'illegality' test), nor whether the decision was procedurally unfair (the 'procedural propriety' test). The question to be determined is whether the power under which the decision-maker acts, a power which normally confers a broad discretion has been improperly exercised. Therefore, a review under this ground extends beyond the process and to the substance or merits of the decision.

[31] A decision which falls on this ground is said to have failed the '*Wednesbury* unreasonableness' test (See *Associated Provincial Picture Houses Limited v. Wednesbury Corp* [1948] 1 KB 223). This is a decision that is said to be so outrageous in its defiance of logic that no sensible person who had applied his mind to it could have arrived at it. It also involves a consideration of the principle of 'proportionality' *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261; *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11). It may also include decisions taken in bad faith, oppressively or based on considerations which have been accorded manifestly inappropriate weight, in addition to strictly irrational decisions which are illogical or arbitrary (*R Rama Chandran*, *supra*).

[32] The Federal Court adopted this principle in the celebrated case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 FC. In that case the registered owner of a piece of freehold land (title in perpetuity) applied to the Federal Government for sub-division of the land and for conversion of the express condition relating to the use of a hotel for which planning permission had been granted. The registered owner was informed that the application would be approved on condition that after surrendering the land, the registered owner would receive back a lease of 99 years instead of title to the land in perpetuity. The registered owner applied to court for an order that the approving authority

A approve its application for sub-division upon the usual terms and conditions. The High Court gave judgment for the registered owner. On appeal the Federal Court held that the approving authority had no power to make the registered owner/applicant give up its freehold title and receive in exchange a 99-year lease. B The condition was set aside. The condition in question which the registered owner objected to did not relate to the permitted development, it was unreasonable and was used for an ulterior object, the object being to bring developed land into line with newly alienated land as to which only leases not titles in perpetuity C are granted. At p. 146 Suffian LP reiterated the following principles:

> I am of the opinion that English cases afford principles that may be followed here. What are the principles? They are:
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> D 1. The approving authority does not have an uncontrolled discretion to impose whatever condition it likes.
>
> 2. The conditions, to be valid, must fairly and reasonably relate to the permitted development.
>
> E 3. The approving authority must act reasonably and planning conditions must be reasonable.
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> 4. The approving authority is not at liberty to use its power for an ulterior object, however, desirable that object may seem to it in the public interest.
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> F .....
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> In reconsidering these applications, the Committee should act fairly and not arbitrarily. There must be no bad faith and no dishonesty, though in fairness to everybody concerned nobody has suggested G that on the part of the Committee. There must be no unreasonableness, no attention to extraneous circumstances, no disregard to public policy, and things of that sort - things mentioned by Lord Greene MR, at page 682 in *Associated Provincial Picture House v. Wednesbury Corporation.*

H At p. 148, Raja Azlan Shah Ag CJ (Malaya) (as HRH then was) said:

> .... On principle and authority, the discretionary power to impose such conditions "as they think fit" is not an uncontrolled discretion I to impose whatever conditions they like. In exercising their discretion, the planning authorities must, to paraphrase the words of Lord Greene MR in *Associated Provincial Picture House v. Wednesbury Corporation* have regard to all relevant considerations and disregard all improper considerations, they must produce a

result which does not offend against common sense: or to repeat Lord Denning MR's words in *Pyx Granite Co Ltd v. Ministry of Housing and Local Government*, approved in *Fawcett Properties Ltd v Buckingham County Council* the conditions to be valid must fairly and reasonably relate to the permitted development. The *dictum* of Lord Denning MR has been frequently quoted and followed in these matters. See *R v. Hillingdon Council, Ex parte Royco Homes Limited*. Lord Denning said (p. 572):

> The principles to be applied are not, I think in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit'. Nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use these powers for an ulterior object, however desirable that object may seem to them to be in the public interest.
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> ...
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> ... Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place", (per Dankwerts LJ in *Bradbury v. London Borough of Enfield*.) (emphasis added)

[33] The law on the doctrine of *ultra vires* is quite settled. In *Penang Development Corporation v. Teoh Eng Huat & Anor* [1992] 1 CLJ 476; [1992] 3 CLJ (Rep) 204 Edgar Joseph Jr J enunciated the law in relation to *ultra vires*. The following passage bears reproduction:

At pp 754-755:

> I recognise that statutory corporations are subject to the doctrine of *ultra vires*. They are mere creatures of the statutes creating them, and the law will not suppose that they were created for any

purpose other than those which induced the legislature to act (see *Harts' Introduction to the Law of Local Government and Administration* (8th Edn.) at pp 292-293).

The doctrine of *ultra vires* as applied to statutory corporations has been well put by Lord Watson in *Baroness Wenlock & Ors v River Dee Company* thuswise at p. 362:

> Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view of carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.

Unlike a natural person who can in general do whatever he pleases so long as what he does is not forbidden by law or contrary to law, a statutory corporation can do only those things which it is authorised to do by statute, directly or by implication. If such a corporation acts otherwise than in this way its acts are *ultra vires*. There must in all cases be statutory authority for what is done, and that authority must either by expressly given or reasonably inferred from the language of an Act of Parliament.

The doctrine, if strictly applied to statutory corporations, would greatly impede their activities and would require empowering legislation to be burdened to an impossible extent by detailed provisions. The courts have therefore held that a corporation may do not only those things for which there is expressed or implied authority, but also whatever is reasonably incidental to the doing of those things. As Lord Selbourne said in *Attorney General v. Great Eastern Railway Co* at p. 478:

> It appears to me to be important that the doctrine of *ultra vires* ... should be maintained. But I agree ... that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be *ultra vires*.

However, this extension, to include powers fairly incidental to those expressly conferred, does not indirectly enable statutory corporations to evade the doctrine of *ultra vires*. When the question arises whether a power if fairly incidental to those expressly given by the incorporating statute, thought it must be

> determined reasonably, the courts will not strain the language of the statute to enable the corporation to engage in activities never contemplated by the legislature. Thus if a company is incorporated by statute to manufacture railway vehicles, it cannot engage in the construction of railway systems (see *Ashbury Railway Carriage & Iron Co Ltd v. Riche*).
>
> In *London County Council v. Attorney General*, Lord Halsbury LC referred to *Ashbury Railway Carriage & Iron Co Ltd v Riche and Attorney General v. Great Eastern Railway* and said: 'I think now it cannot be doubted that those two cases do constitute the law upon the subject.'
>
> On the other hand, the tendency of the modern law is to show that the courts are more liberal in their interpretation of what is fairly incidental than was formerly the case (see *A-G v Crayford Urban District Council* and *Bell Houses Limited v. City Wall Properties Ltd*). thus it has been held that the setting up of a department to undertake the provision of all the printing and stationery required by a borough council is fairly incidental to the purposes of a municipal corporation, and so not *ultra vires* (see *A-G v. Smethwick Corp*). So also, the employment of a consultant rating surveyor to advise a rating authority on proposals under the Local Government Act 1948, was not *ultra vires* (see *Grainger v. Liverpool Corp*).

And at p. 756:

> It follows that in the application of the doctrine of *ultra vires* there are then three issues: first, whether what is done is specifically authorised by statute; secondly, whether (if there be no specific authority) one can reasonably imply authority from the language of the statute; and thirdly, whether an act for which no such direct or implied authority is found is reasonably incidental to the carrying into effect of a statutory purpose (see CA Cross, *Principles of Local Government Law,* (4th Edn.) pp 8-9).

Findings Of The Court

[34] The applicant's principal argument is premised on the ground that they are not the importer of the prime movers. It is contended that Scania Malaysia had in fact paid to Scania UK for the prime movers. The applicant only paid the full purchase price to Scania Malaysia upon being invoiced locally by Scania Malaysia and after the prime movers were duly released from customs control. The charges paid by the applicant to the forwarding agents included the customs duties and all incidental service charges for the prime movers.

[35] Learned counsel for the applicant submitted that it is the duty of the first respondent as the decision maker to make a full enquiry on the claims and to apply his mind on the evidence on record. The first respondent should not have acted mechanically in accepting the views of the second respondent.

[36] At this point, it is pertinent to set out the provisions relating to the decision of the first respondent which were made pursuant to s. 14A of the Customs Act and s. 33 of the Sales Tax Act.

> Section 14A of the Customs Act 1967
>
> Minister may remit customs duties
>
> 14A. The Minister **may, if he thinks it just and equitable to do so**, and subject to such conditions as he may deem fit to impose, remit the whole or any part of the customs duties or any other prescribed fees or charges payable under this Act. (emphasis added)
>
> Section 33 of the Sales Tax Act 1972
>
> Remission
>
> 33. The Minister **may, if he thinks it just and equitable to do so**, and subject to such conditions as he may deem fit to impose, remit the whole or any part of any sales tax due and payable under this Act, or the whole or any part of any penalty payable under section 24. (emphasis added)

[37] The pertinent phrase in the abovementioned sections relates to the part that the Minister 'may, if he thinks it just and equitable to do so' remit any duties or tax in whole or in part. On a plain reading of the provisions, it is clear that the Minister is vested with a discretionary power whether to remit any duties or taxes, provided he thinks it just and equitable to do so.

[38] According to *Words, Phrases & Maxims, Legally & Judicially Defined*, Anandan Krishnan vol. 11 Lexis Nexis at p. 128:

> The use of the expression 'may' is not decisive. Having regard to the context, the expression 'may' used in a statute had varying significance. In some contexts it is purely permissive, in others, it may confer a power and make it obligatory upon the person invested with the power to exercise it as laid down (*Societe De Traction et D'Electricite Societe Anonyme v. Kamani Engineering Co Ltd* AIR SC 558 at 562].

[39] The *Stroud's Judicial Dictionary of Words and Phrases* Seventh Edition at p. 1644 defines the word 'may' as:

> ... it seems a plain conclusion that "may", "it shall be lawful", "it shall and may be lawful", "empowered", "shall hereby have power", "shall think proper", and such like phrases, give, in their ordinary meaning, an enabling and discretionary power. "They are potential and never (in themselves) significant of any obligation" (per Lord Selborne, *Julius v. Oxford (Bishop)*, 49 L.J.Q.B. 585; 5 App. Cas 235). "They confer a faculty or power, and they do not of themselves do more than confer a faculty or power"; and therefore, where the point in question is not covered by authority, "it lies upon those who contend that an obligation exists to exercise this power, to show in the circumstances of the case something which according to the principles I have mentioned creates this obligation" (per Cairns C., 49 L.J.Q.B. 578 at 579; 5 App. Cas. 223). On that case Cotton L.J., observed: "'May' never can mean 'Must', so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a judge has a power given him by the word 'may', it becomes his duty to exercise that power (*Re Baker, Nichols v. Baker* 44 Ch D. 262).

[40] In the case of *Minister Of Labour & The Government of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC, the question which came up for determination was whether the Minister had properly exercised his discretion not to refer a representation to the Industrial Court. In that case, the power of the Minister under s. 20(3) of the Industrial Relations Act 1967 was couched in the following words – "Upon receiving the notification of the director general under sub-s. (2), the Minister may, if he thinks fit, refer the representation to the Court for an award". The Supreme Court held that the power of the Minister under s. 20(3) is wide and confers on the Minister a wide discretion whether to refer or not to refer a dispute to the Industrial Court, depending on the facts of each case provided that he has acted *bona fide*, that is without any improper motive and he has not taken into account extraneous or irrelevant matters.

[41] Even though the discretionary power in the hands of the Minister is very wide, it is not unlimited. It must be read in the context of the expression "if he thinks it just and equitable to do so". So long as he exercises the discretion without improper motive the exercise of discretion must not be interfered with by the court. However, the court will interfere if it can be shown that

he had misdirected himself in law or had taken into consideration irrelevant matters or had failed to take into account relevant matters, or if his decision militates against the object of the statute.

[42] It is also pertinent to note that an exercise of a discretion does not always mean that it should be exercised only in a positive manner. A negative act is equally an exercise of a discretion, provided that the Minister had considered every aspect of the case (see *Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 CLJ 227; [1998] 1 MLJ 305 CA).

[43] According to the affidavit affirmed by the first respondent, the first respondent had considered all the evidence and materials submitted by the second respondent. What did he consider? He took into account the fact the role played by the applicant in the importation of the prime movers. He had considered that the applicant fell within the meaning of the word "importer" in the Customs Act. According to s. 2 of the Customs Act the word "importer" includes and applies to any owner or other person for the time being possessed of or beneficially interested in any goods at and from the time of importation thereof until such goods are duly reformed from customs control.

[44] The first respondent took into account the fact that even though Red Synergy was named as the consignee and AP holder, Red Synergy did not pay the customs duties or sales taxes on the prime movers. Instead, the duties and taxed were paid by the applicant through the forwarding agents. This finding is corroborated by the fact that the forwarding agents had issued various invoices to the applicant for their service charges, customs duties. The first respondent also considered (i) a letter dated 1 April 2008 from Scania Malaysia to the applicant; where it is clearly stated that the applicant will be responsible for all customs duties and taxes relating to the prime movers (exh. AY-3); and (ii) e-mails between Scania UK and the applicant concerning the importation of the prime movers into Malaysia (exh. AY-4).

[45] Also considered was the fact that the claims for the shortfall duties were made under s. 13(2) of the Customs Act which provides that a valuation of duties by the proper customs officer shall be presumed to be correct until the contrary is proved. In this instance, the valuation was made as result of an audit carried out by the second respondent. The actual value of the prime

movers was discovered upon examination of the actual invoices from Scania UK to Scania Malaysia (exh. AY-5). As no contrary evidence was submitted to rebut the valuation of the second respondent, the valuation must be taken to be correct.

[46] The first respondent accepted the fact that Scania Malaysia were the sole agent of the Scania brand prime movers in Malaysia. As such, Scania Malaysia only played the role of an agent and credit guarantor for the purchase of the prime movers. This fact was corroborated by a letter dated 8 July 2010 from Scania Malaysia to the customs department. In that letter, Scania Malaysia confirmed that as Scania Malaysia is the guarantor for the payment, it is normal practice for the invoice to be issued to Scania Malaysia and the bill of lading to be in the name of the same consignee. At the same time, it was also normal practice to insert the importer's name (Red Synergy) in the customs form and the certificate of origin.

[47] As such, the first respondent was correct to infer that Red Synergy as the consignee/importer and AP holder was not directly involved in making out the declaration in the customs form K1. The declaration in the K1 form and payments for all the duties and taxes were made by the forwarders. The prime movers had been released from customs control after the customs duties and sales taxes based on the declared values were paid.

[48] There is no evidence to show that the first respondent took into account any irrelevant evidence or material or that he had failed to consider any relevant evidence or material. The first respondent had considered all the relevant evidence and materials before arriving at his decision.

[49] Be that as it may, is there any evidence to support the proposition that the first respondent refused to remit the duties and taxes even though he did not think it just or equitable to do so. If so, then it may be argued that the discretion was improperly exercised or that it was exercised for an improper motive.

"Just and Equitable" - Meaning Of

[50] In this context it would be necessary to consider the meaning of the expression "just" and "equitable". The word "just" is derived from the Latin word *Justus*. It has various meanings which are often governed by the context. The word "just" may

apply in nearly all of its senses, either to ethics of law, denoting something which is morally right and fair and sometimes that is right and fair according to positive law. It connotes reasonableness and something conforming to rectitude and justice, something equitable and fair (*Words, Phrases & Maxims, Legally & Judicially Defined*, Anandan Krishnan vol. 10 Lexis Nexis at p. 272).

[51] The expression "equitable" is defined in *Black's Law Dictionary* eighth edn. as 'just; consistent with principles of justice and right; existing in equity; available or sustainable by an action in equity, or under the rules and principles of equity'. For equal measure, *Jowitt's Dictionary of English Law* second edn. defines "equitable" to mean 'that which is fair; that which arises from a liberal construction or application of a legal rule or remedy; that which is in accordance with, or regulated, recognised, or enforced by, the rules of equity, as opposed to those of the common law.'

[52] On the totality of the facts as disclosed in the affidavit evidence, it cannot be denied that the applicant plays a key role in the importation of the prime movers into Malaysia. Red Synergy was the conduit as it was the holder of the APs without which the prime movers could not be imported into Malaysia. The invoices for the service charges and customs duties were issued by the forwarders to the applicant; and the applicant paid both the service charges and duties in full. The applicant had also accepted the fact that they were liable for all duties and taxes when they signified their acceptance on a copy of Scania Malaysia's letter dated 1 April 2008 (exh. AY-3). Finally, there are the e-mails between Scania UK and the applicant evidencing direct dealing between the parties for the importation of the prime movers.

[53] At this juncture, it is pertinent to note the applicant's assertion that it purchased the prime movers from Scania Malaysia. On all these facts, it is reasonable to infer that it is just and equitable to refuse to grant a remission on the ground that the applicant is an importer and is therefore beneficially interested in the prime movers at and from the time of importation until their removal from customs control pursuant to s. 2 of the Customs Act. For the foregoing reasons, the court is satisfied that the first respondent applied his mind correctly when making the decision.

[54] The applicant also complained that a compound was issued by the customs department to Red Synergy; and that as such the applicant cannot be liable for the same. In answer to this point, the second respondent has affirmed in his affidavit that the

compound was not in respect of the shortfall but for breach of ss. 100 and 100A of the Customs Act which relates to documents to be produced on demand and records of imported goods. As the compound does not relate to the shortfall duties and taxes, it is not a relevant consideration.

[55] For the foregoing reasons, the applicant has failed to make out a case to show that the first respondent failed to exercise his discretion improperly or for an improper motive. Accordingly, the application for judicial review is dismissed with costs.